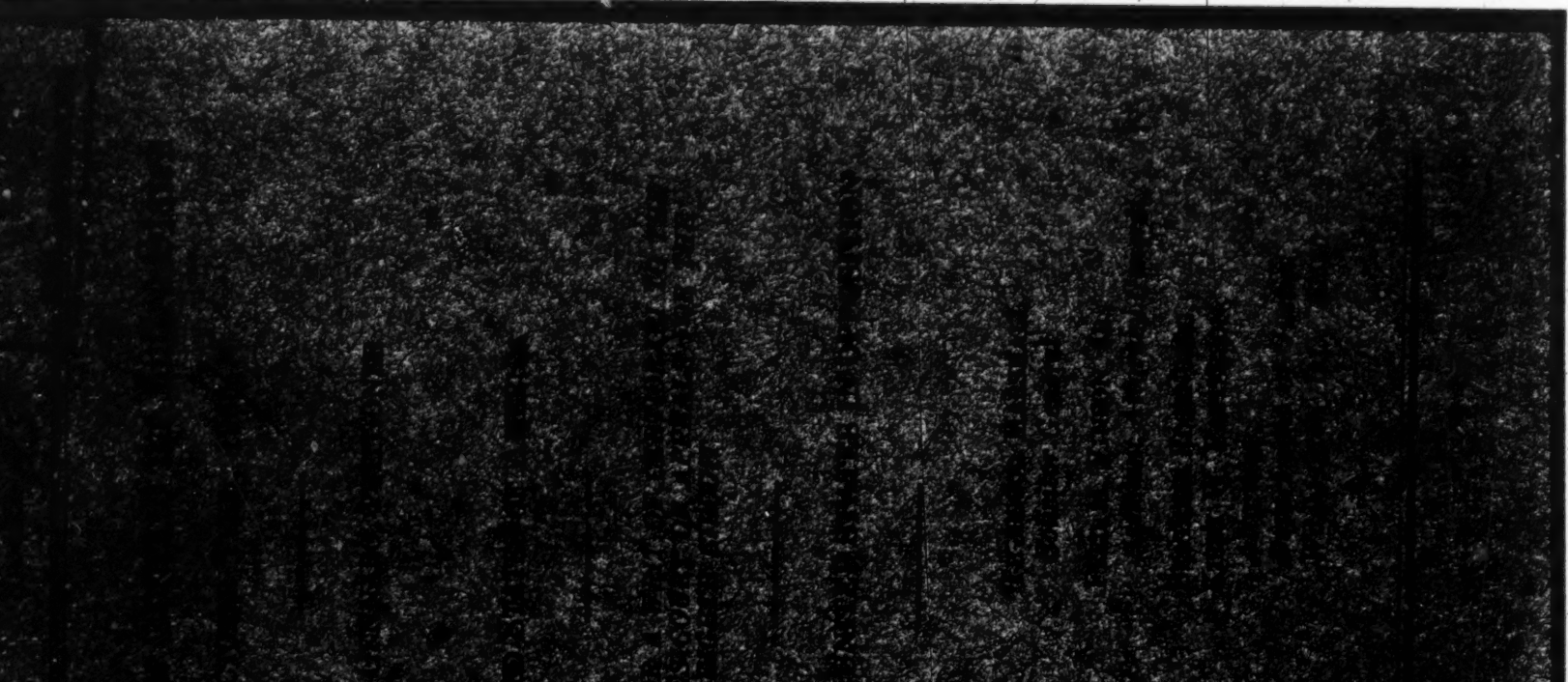

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1001

BEN GENNARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11) is reported at 369 F.2d 106.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1966. The petition for a writ of certiorari was filed on January 25, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for failure to pay the tax imposed on persons engaged in the business of wagering, the judge, in defining "occupation", erred by not requiring the jury to find specifically that petitioner had "a proprietary interest in a bookmaking operation."

STATUTES INVOLVED

26 U.S.C. 4411 provides as follows:

> There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. 4401(c) provides in pertinent part:

> Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. * * *

26 U.S.C. 7262 provides as follows:

> Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

26 U.S.C. 7203 provides in pertinent part:

> Any person required under this title to pay any estimated tax or tax * * * who willfully fails

to pay such estimated tax or tax * * * shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT

After a trial by jury in the United States District Court for the Eastern District of Missouri, petitioner was convicted of (1) willfully and knowingly engaging in the business of accepting wagers as a bookmaker during the tax year 1964-1965, without paying the occupational tax imposed by Section 4411 (in violation of 26 U.S.C. 7262), and (2) willfully and knowingly failing to pay the said tax during the tax year 1965-1966 (in violation of 26 U.S.C. 7203). He was sentenced to pay a fine of $1,000 on the first count and to a fine of $1,000 and six months' imprisonment on the second count (1 R. 15; 2 R. 93-95). The court of appeals affirmed.

The evidence showed that, in the period from June 3 to October 20, 1965, agent Wallace of the Internal Revenue Service placed numerous bets with petitioner, the operator of a bar in St. Louis (2 R. 10-18, 21-22, 27-29). Petitioner instructed that when he was not in, Wallace could "give his action" to Williams, an employee (2 R. 12). When Wallace said that he would have to be out of the State, petitioner told him it would be all right to call in his "action" (2 R. 16-17). In October petitioner proposed that Wallace operate in partnership with him in the distribution of

football cards and offered to let Wallace buy into his handbook operation for $2,500 (2 R. 22-29). A search under warrant of petitioner's bar resulted in the seizure of various items of gambling paraphernalia (2 R. 53-58).

Petitioner had no federal wagering stamp (2 R. 52, 61-65) although he knew of the federal statute (2 R. 22).

ARGUMENT

The trial court instructed the jury in part as requested by petitioner (2 R. 91):

> The tax involved in this case is what is known as an "occupational tax". The term "occupation" is synonymous with calling, trade, business or profession. "Occupation" as commonly understood signifies the business or activity in which a person is engaged.[1]

He also instructed (2 R. 91-92):

> Unless you find and believe from the evidence beyond a reasonable doubt that the defendant Ben Gennaro was engaged in bookmaking as an occupation you must find the defendant Gennaro not guilty on Counts I and II of the indictment.

As originally submitted by petitioner, this instruction would also have required the jury to find that Gennero "had a proprietary interest in the bookmaking operation" (2 R. 67). Petitioner argues that the

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[1] Petitioner's requested instructions ended with the words "engaged in order to secure a living or to obtain wealth" (2 R. 67).

failure to include that phrase constituted reversible error. It was not, however, necessary to show that petitioner had a proprietary interest in the business, so long as he was engaged in bookmaking as an occupation. A managerial interest would be sufficient. See *United States* v. *Marquez*, 332 F.2d 162 (C.A. 2), certiorari denied, 379 U.S. 890.

Petitioner misapprehends the scope of the decision in *United States* v. *Calamaro*, 354 U.S. 351. There it was held that a "pick-up man" in a numbers operation was little more than a messenger and not within the intended coverage of the statute. In making the distinction between such an individual and a "banker", the Court did point out that the banker has a proprietary interest in the business. That, however, carries no implication that one must have such an interest in order to be engaged in the occupation. The undisputed evidence was that petitioner acted as a principal, not as an employee (as in *Calamaro*) whose duties were limited to the manual transfer of gambling records. Cf. *Evans* v. *United States*, 349 F.2d 653 (C.A. 5). That is the determinative fact.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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